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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

OPTIMUM PRODUCTIONS, a California corporation; and JOHN BRANCA and JOHN MCCLAIN, in the respective capacities as CO-EXECUTORS OF THE ESTATE OF MICHAEL J. JACKSON,

Plaintiffs,

v.

HOME BOX OFFICE, a Division of TIME WARNER ENTERTAINMENT, L.P., a Delaware Limited Partnership; HOME BOX OFFICE, INC., a Delaware corporation; DOES 1 through 5, business entities unknown; and DOES 6 through 10, individuals unknown,

Defendants.

Case No. 2:19-CV-01862-GW-PJW

Hon. George H. Wu

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HOME BOX OFFICE, INC.'S SPECIAL MOTION TO STRIKE PLAINTIFFS' PETITION (CAL. CODE CIV. PROC. § 425.16)

Hearing Date: September 19, 2019
Hearing Time: 8:30 a.m.

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I. INTRODUCTION

Less than two weeks before *Leaving Neverland* was scheduled to premiere on HBO, Optimum Productions, John Branca, and John McClain (collectively, "Plaintiffs") very publicly filed a Petition to Compel Arbitration that aggressively attacks HBO for exercising its free speech rights when it chose to exhibit the documentary, seeks to compel an unavailable "public" arbitration over an expired contract, and asserts they are entitled to more than $100 million in damages—including punitive damages—allegedly arising from statements made in the film about Michael Jackson. The only possible reason why Plaintiffs filed their Petition in court was to attract maximum attention to their public relations campaign against *Leaving Neverland* and the documentary's subjects, two men who recount in the film in extraordinary detail how, as boys, they were serially sexually abused by Mr. Jackson. But neither the Estate of Michael Jackson nor anyone else owns history, especially history involving a world-famous and controversial public figure. *Leaving Neverland*'s filmmakers were fully within their rights to tell Mr. Robson's and Mr. Safechuck's important stories, and HBO was fully within its rights to exhibit the newsworthy documentary.

By filing their Petition seeking relief based on the content of a documentary film about a matter of public concern *in court*, Plaintiffs triggered California's anti-SLAPP law, California Civil Code of Procedure section 425.16, which was enacted to protect defendants against meritless claims arising from the exercise of free speech rights. Plaintiffs' unconstitutional conduct falls squarely within the boundaries of what the anti-SLAPP law was enacted to prevent—deep-pocketed plaintiffs using the prospect of expensive and time-consuming litigation (in whatever forum) to chill speech they do not like. *See De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 849–50 (2018) ("The First Amendment protects . . . expressive works and the free speech rights of their creators."), *review denied* (Cal. Jul 11, 2018), *cert. denied*, 139 S. Ct. 800 (2019); *Connick v. Myers*,

461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (quotations omitted)).

Plaintiffs' claims against *Leaving Neverland*—an expressive, newsworthy work about an issue of unquestionable public concern—violate HBO's First Amendment and due process rights, and run afoul of California's public policies. And Plaintiffs seek to bring their disguised and legally barred defamation action by reviving an inapplicable and long-expired 27-year-old contract. However, because Plaintiffs cannot establish a probability of success on those claims, HBO's Special Motion to Strike should be granted and HBO awarded its attorneys' fees.

II. RELEVANT FACTUAL BACKGROUND

HBO owns and operates the HBO premium pay television service, which today contains over 3,000 hours of curated content, including, among other things, original series, films, documentaries, and concert specials. HBO offers some of the most innovative, honored, and critically respected programming on television. In 1992, that included the one-time exhibition of *Michael Jackson: Live in Bucharest* ("*Live in Bucharest*"), a concert special presenting Mr. Jackson's 1992 performance during his *Dangerous* world tour.

More than 26 years later (and nearly a decade after Mr. Jackson's death), *Leaving Neverland* premiered on HBO. *Leaving Neverland* tells the personal stories of two individuals who describe in detail how, as young boys, they were sexually abused for years by Mr. Jackson. *Leaving Neverland* premiered on HBO on March 3, 2019, in the midst of a nationwide cultural debate about sexual abuse and harassment, and whether such misconduct had for too long been tolerated or suppressed in favor of protecting the wealthy, famous, and powerful.

Plaintiffs and those who profit from Mr. Jackson's legacy have castigated HBO over *Leaving Neverland*, as is their right under the First Amendment (just as it is HBO's right to exhibit it). As part of Plaintiffs' public relations campaign

against *Leaving Neverland* and its subjects, Plaintiffs demanded that HBO shelve the documentary because, among other things, the filmmakers allegedly did not seek to tell Mr. Jackson's side of the story (which of course they had no obligation to do). Plaintiffs also seek to apply a long-expired and irrelevant July 22, 1992 agreement between Home Box Office, a division of Time Warner Entertainment Company, L.P. ("TWE," which is not the same entity as Defendant HBO) and TTC Touring Corporation ("TTC," which is not the same entity as Plaintiff Optimum Productions) (the "1992 Agreement") regarding the production and exhibition of *Live in Bucharest*, in an effort to bring an otherwise barred posthumous defamation claim against HBO.[1] *See* Dkt. 18, Ex. B.

Leaving Neverland screened at the Sundance Film Festival in January 2019. It then premiered on HBO on March 3 and 4, 2019 (as a two-part documentary). The documentary was developed and is owned by Amos Pictures, Ltd., which is not a party to this lawsuit, and was licensed to HBO for distribution in the United States, Canada, and Bermuda. Dkt. 22-1 ¶ 3. The film presents the stories of two men, Wade Robson and James Safechuck, who describe how Mr. Jackson sexually abused them as children, and tells that story from the survivors' point of view, including the lasting impact of the abuse on their lives. The documentary has ignited important conversations and reckonings in the public and media regarding Mr. Jackson and survivors of child abuse.

Plaintiffs' public campaign against *Leaving Neverland* appears to have kicked off in earnest shortly after the film premiered at Sundance, when Plaintiffs' lawyer sent a ten-page letter to HBO, on February 7, 2019. The letter contained a litany of complaints about *Leaving Neverland*, attacking its subjects as liars, protesting that the Estate was not given an opportunity to tell its side of the story in the film, calling HBO's former CEO "naïve," and ultimately lamenting that HBO's

[1] Plaintiffs allege that the parties to this action are the successors to the original contracting parties. For purposes of this motion, HBO does not contest that Optimum Productions is the successor to TTC.

involvement with the documentary "is just plain sad." Dkt. 18, Ex. A, at 2–5. Plaintiffs raised additional non-legal grievances about *Leaving Neverland*, including that "[t]he usual checks on filmmakers are ethical and normative ones," and claiming that HBO "no longer cares" about such norms. *Id.* at 4. Notably, Plaintiffs' February 7 letter did not once mention the 1992 Agreement, nor did it mention any actual legal claims the Estate believed it had against HBO. Rather, the letter asked that HBO reconsider its decision to exhibit the documentary. *See id.* at 10 (offering "to meet with HBO" and present "further information and witnesses" to counter Mr. Robson's and Mr. Safechuck's accounts). While the February 7 letter does not state that the Estate holds any continuing or relevant rights under the 1992 Agreement or the Confidentiality Provisions thereof, the letter acknowledges that HBO and Jackson had worked together on *Live in Bucharest*. *See id.* at 9 (noting that HBO "had partnered with Michael to immense success"). Plaintiffs never mentioned the prospect of arbitration or that they believed they had any viable claims in their February 7 letter.

Two weeks later, Plaintiffs filed their Petition, seizing on a non-disparagement sentence buried in the 1992 Agreement that Plaintiffs erroneously assert enables them to avoid the black-letter bar on posthumous defamation claims. However, Plaintiffs did not follow the usual path for pursuing arbitration. Rather than filing an arbitration demand with the American Arbitration Association ("AAA"), Plaintiffs filed their Petition in Superior Court for the County of Los Angeles, on February 21, 2019, seeking a "*public* arbitration" of their claims for breach of the 1992 Agreement. Dkt. 1-1 ¶ 73 (emphasis added). Plaintiffs asserted they were seeking $100 million in damages—including *punitive* damages—*before* HBO debuted *Leaving Neverland* to the public, on March 3 and 4. Only on March 5, after *Leaving Neverland* premiered on HBO, did Plaintiffs write to HBO to ask whether it would agree to arbitrate. *See* Dkt. 22-1 ¶ 4, Ex. A.

In their Petition, Plaintiffs assert two claims, for breach of contract and

breach of the covenant of good faith and fair dealing, alleging that HBO "breached [its] obligations" to Plaintiffs by disparaging Mr. Jackson and "disparaging the Dangerous World Tour." Dkt. 1-1 ¶ 83. However, Plaintiffs have not alleged, nor to this day provided any evidence (because they cannot), that *Leaving Neverland* contained any information (confidential or otherwise) that HBO obtained during the course of its performance of the 1992 Agreement. *See* Dkt. 18, Ex. B (Ex. I, at 1) (purporting to bar the use of "Confidential Information" obtained "*[p]rior to and/or during* HBO's contract or relationship with [TTC]" (emphasis added)).

After Plaintiffs filed their complaint, they and their counsel have continued to wage a public relations campaign against HBO and *Leaving Neverland*. In doing so, they have confirmed that their true complaint about the film is that it allegedly defames Mr. Jackson. *See* Dkt. 1-1 ¶ 38 (calling film's abuse allegations "utterly false"). Indeed, in April 2019, Mr. Branca stated that "[b]ecause the laws of defamation are what they are, there is nothing we can do or say. . . . The man can be damaged, his kids can be hurt and theoretically nothing can be done. I'm going to suggest the law should be changed to protect the deceased at least for a period of time."[2] In June 2019, Mr. Branca added that "there's no reason why defamation should not extend beyond somebody's life . . . ."[3]

Following briefing and arguments on Plaintiffs' Motion to Compel Arbitration, and in view of the Court's recognition that "the initiation of litigation itself can trigger First Amendment concerns," (Dkt. 40 (7/15/2019 Tentative Ruling), p. 9 (citing § 425.16(a))), HBO brings this Special Motion to Strike.

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[2] Claudia Rosenbaum, *Michael Jackson Co-Executor John Branca Says He's Considering Suing 'Leaving Neverland' Director Dan Reed*, Billboard (Apr. 16, 2019), https://www.billboard.com/articles/news/8507510/michael-jackson-estate-hits-back-leaving-neverland.

[3] UCLA Law School Presentation: *Truth Be Told? Documentary Films Today* (at 1:15-1:30), *available at* https://www.youtube.com/watch?v=Wcd1ISN7JuQ.

III. LEGAL STANDARD

California's anti-SLAPP law provides defendants with a powerful tool to seek early dismissal of meritless lawsuits that attack the exercise of their First Amendment rights of petition and free speech. *Metabolife Intern., Inc. v. Wornick*, 72 F. Supp. 2d 1160, 1165 (S.D. Cal. 1999) ("To ensure that participation in public debate is not 'chilled,' the anti-SLAPP statute establishes a procedure for early dismissal of meritless lawsuits against public speech."). The legislature enacted the law after finding "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech. . . ." Cal. Civ. Proc. Code § 425.16(a). As such, the anti-SLAPP statute is designed to ensure that the exercise of free speech rights will "not be chilled through abuse of the judicial process," and to that end, confirmed that the law "shall be construed broadly." *Id.*

The anti-SLAPP statute provides a two-step process to determine if a plaintiff's claim is subject to a special motion to strike. First, a defendant must demonstrate that a "cause of action against [it] aris[es] from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." *Id.* § 425.16(b)(1). If it does, as a second step, the burden shifts to the plaintiff to "establish that there is a probability that the plaintiff will prevail on the claim." *Id.*; *Gamble v. Kaiser Foundation Health Plan, Inc.*, 348 F. Supp. 3d 1003, 1023 (N.D. Cal. 2018) ("[T]he burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated."). If a plaintiff fails to meet its burden on this second step, there is "no possibility of success on the merits and the Court must grant [the] motion to strike." *Makaeff v. Trump Univ., LLC*, 26 F. Supp. 3d 1002, 1007 (S.D. Cal. 2014) (quotations omitted).

Anti-SLAPP motions can be brought in response to complaints, cross-complaints, and petitions. *See* Cal. Civ. Proc. Code § 425.16(h) ("[f]or purposes of

this section, 'complaint' includes 'cross-complaint' and 'petition,' [and] 'plaintiff' includes 'cross-complainant' and 'petitioner'").[4] As such, an anti-SLAPP motion to strike can, by the terms of the statute itself, be brought against a petition to compel arbitration. *See, e.g.*, *Thomas v. Quintero*, 126 Cal. App. 4th 635, 646 (2005) ("facially the anti-SLAPP statute applies to petitions"). Where a plaintiff files an action—whether a complaint or petition—in court, a defendant may invoke the protections of the anti-SLAPP law to "prevent abuse of the judicial process." *Sheppard v. Lightpost Museum Fund*, 146 Cal. App. 4th 315, 318, 323 (2006) (holding that section 425.16 "does not authorize a . . . court to grant a motion to strike an arbitration claim filed only in an agreed *arbitral* forum and not asserted by the claimant in any . . . petition filed *in court*" (emphasis added)).

Plaintiffs' suggestion that the Court should not consider an anti-SLAPP motion and that an arbitrator should rule on HBO's First Amendment defenses in the first instance is incorrect.[5] Here, it is for the Court because Plaintiffs filed a lawsuit aimed at suppressing HBO's speech on an issue of public concern *in court*, rather than initiating arbitration, thereby triggering the anti-SLAPP statute and enmeshing the Court in what otherwise might have been a private arbitral affair, which runs counter to the Federal Arbitration Act's principles. *See Dees v. Billy*, 394 F.3d 1290, 1291–92 (9th Cir. 2005) ("The [FAA] . . . represents Congress's intent to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." (internal quotations omitted)); *see also Sheppard*, 146 Cal. App. 4th at 323–24. Indeed, Plaintiffs ask this Court to exercise its

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[4] Typically, claimants initiate arbitration by filing a demand with the private arbitration association specified in an arbitration agreement without involving a court. Indeed, the current AAA rules confirm a claimant party need not seek permission from a court to file a demand: "[a]rbitration under an arbitration provision in a contract shall be initiated by the initiating party ('claimant') *filing with the AAA* a Demand for Arbitration." Declaration of Nathaniel L. Bach ("Bach Decl."), Ex. A, p. 11 (R-4(a)) (emphasis added).

[5] *See* Bach Decl., Ex. B (7/15/2019 Hrg. Tr.) at 27:21–28:7.

judicial power to order something not even contemplated by the FAA, the AAA Rules, or the 1992 Agreement—a "*public*" arbitration. Dkt. 1-1 ¶ 73 (emphasis in original). HBO therefore brings its timely Special Motion to Strike Plaintiffs' Petition.[6]

IV. ARGUMENT

A. Plaintiffs' Claims Arise from an Exercise of HBO's Free Speech Rights on a Public Issue.

Plaintiffs' claims arise from HBO's exhibition of *Leaving Neverland*, an act unquestionably in furtherance of HBO's free speech rights on a public issue. Under California's anti-SLAPP law, causes of action "arising from any act of [a] [defendant] in furtherance of the [defendant's] right of . . . free speech . . . in connection with a public issue" are subject to a special motion to strike. Cal. Civ. Proc. Code § 425.16(b)(1); *see also* § 425.16(e)(4) (further defining law to cover "any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest"). Courts analyze "the gravamen or principal thrust" of a plaintiff's claims to determine whether they are "based on the defendant's protected free speech or petitioning activity." *In re Episcopal Church Cases*, 45 Cal. 4th 467, 477–78 (2009) (quotations omitted).

Plaintiffs' Petition raises two causes of action: (1) breach of contract based on alleged breach of a non-disparagement sentence, and (2) breach of the covenant

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[6] Plaintiffs' suggestion that the 60-day timing provision of Section 425.16 applies in federal court is wrong. Bach Decl., Ex. B at 19:13–19. Where, as here, California's anti-SLAPP is applied in a federal court sitting in diversity, the 60-day rule is preempted by the federal rules. *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016) ("declin[ing] to apply the statute's 60-day time frame in federal court, and . . . refer[ing] instead to our own rules of procedure" to find that "defendants' anti-SLAPP motions were timely filed"); *see also Planned Parenthood Fed. Of Am., Inc. v. Center for Med. Progress*, 890 F.3d 828, 833–34 (9th Cir. 2018) (construing anti-SLAPP motion's procedure under either Rule 12(b)(6) or Rule 56, depending on grounds therefore).

of good faith and fair dealing. *See* Dkt. 1-1, pp. 21–22. Both of these causes of action arise from what Plaintiffs describe as "HBO's production and airing of *Leaving Neverland*[,]" a clear exercise of HBO's free speech to which the anti-SLAPP law applies. Dkt. 1-1 ¶ 24; *see, e.g.*, *Tamkin v. CBS Broadcasting, Inc.*, 193 Cal. App. 4th 133, 143 (2011) (confirming "[t]he creation of a television show is an exercise of free speech" to which anti-SLAPP law applies). *Leaving Neverland* presents the important stories of two individuals who detail their experiences of being sexually abused by Mr. Jackson, arguably one of the world's most famous public figures. Their stories are all the more compelling and newsworthy because they also describe how and why they were afraid to come forward for years, including during a prior public trial. California law and public policy make clear the critical public interest in protecting minors from sexual abuse and in encouraging them and others to come forward with the truth. Cal. Civ. Proc. Code § 1002(a)(3) (prohibiting confidentiality provisions in civil settlements that "prevent[] the disclosure of factual information" for any acts of "childhood sexual abuse" or "sexual exploitation of a minor"); *see also* Cal. Penal Code § 11164 *et seq.* (imposing a mandatory reporting obligation on certain individuals in cases of known or suspected child abuse or neglect).[7]

While Plaintiffs allege contract claims, the gravamen of their claims arises from HBO's exercise of its free speech rights in exhibiting *Leaving Neverland*, a documentary about a public figure and issues of unquestionable public interest. "It is settled that 'a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a 'garden variety' . . . contract claim when in fact the claim is predicated on protected speech

[7] The legislative history of these laws confirms that the public "has such a strong interest in the prosecution of individuals who commit acts of childhood sexual abuse and exploitation that the ordinarily useful tool of confidentiality provisions in settlement agreements should not be allowed in civil actions based upon those acts." *See* Dkt. 22-2 ¶ 6, Ex. E.

or conduct.'" *Contreras v. Dowling*, 5 Cal. App. 5th 394, 413 (2016) (citations omitted). In *Vivian v. Laburcherie*, for example, a plaintiff brought a breach of contract claim for a defendant's alleged breach of a non-disparagement provision. Facing an anti-SLAPP motion, the plaintiff argued the action was not filed "because [the defendant] engaged in protected speech but because [the defendant] breached a contract that prohibit[ed] her from engaging in certain speech-related conduct." 214 Cal. App. 4th 267, 273 (2013). The court disagreed, and held that the plaintiff's claim for breach of a non-disparagement provision was subject to an anti-SLAPP motion. *See id.*

Plaintiffs' claims indisputably arise from HBO's exhibition of *Leaving Neverland*, which is an act in furtherance of HBO's constitutional right of free speech in connection with an issue of public interest (*see* § 425.16(e)(4)). Indeed, the Court recognized as much in its July 15, 2019 tentative ruling. Dkt. 40, p. 9 ("It cannot be doubted that Plaintiffs' arbitration action is seeking to recover damages based upon [HBO's] broadcasting a documentary."). HBO has therefore established that the first prong of the anti-SLAPP law is met, and the burden shifts to Plaintiffs to establish that their claims have merit.

B. Plaintiffs Cannot Establish a Reasonable Probability that They Will Prevail on Their Claims, and Their Petition Must Be Struck.

Under the second prong, the burden shifts to the plaintiff "to establish a reasonable probability that it will prevail on its claim in order for that claim to survive dismissal." *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013). Courts consider not only the "substantive merits of the plaintiff's complaint," for which the plaintiff bears the burden of proof, but also "all available defenses . . . including, but not limited to constitutional defenses." *Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (2004). A defendant carries its burden to show that an affirmative defense is available if it establishes "a probability of prevailing" on the merits of the defense. *Davis v. Electronic Arts Inc.*, 775 F.3d 1172, 1177 (9th Cir. 2015) (quoting *Premier Med. Mgmt. Sys., Inc. v.*

Cal. Ins. Guarantee Ass'n, 136 Cal. App. 4th 464, 477 (2006)).

The ultimate burden rests, however, with the plaintiff. *See Premier Med. Mgmt. Sys.*, 136 Cal. App. 4th at 479 (trial court erred in denying defendant's motion to strike because plaintiff failed to establish that exception to affirmative defense—which defendants "established a probability of prevailing on"—was available); *Wagner v. S. Cal. Edison Co.*, 2019 WL 1746129, at *4 (C.D. Cal. Apr. 18, 2019) (at second step, plaintiff must "present admissible evidence to defeat any privilege or legal defenses raised by the defendant"). Accordingly, a plaintiff's claim must be dismissed if it "presents an insufficient legal basis for [the claim], or if, on the basis of the facts shown by the plaintiff, 'no reasonable jury could find for the plaintiff.'" *Makaeff*, 715 F.3d at 261 (quoting *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001)).

Here, Plaintiffs cannot establish that there is a reasonable probability they will prevail on their breach of contract claims for two reasons. First, Plaintiffs' claims unlawfully target HBO's free speech rights in violation of the First Amendment, the Due Process Clause, and public policy. Second, Plaintiffs cannot state claims for breach because the 1992 Agreement is terminated and does not pertain to *Leaving Neverland*. In other words, Plaintiffs' breach of contract claims fail as a matter of law because there is no valid contract on which to sue. Accordingly, HBO's motion to strike should be granted.

1. The First Amendment, Due Process Clause and California Public Policy Forbid Enforcement of the Non-Disparagement Sentence.

By filing a petition *in court* and asking this Court to use its *judicial power* to further their efforts to attack HBO's speech, Plaintiffs have deliberately enmeshed this Court in an interpretive exercise that constitutes "state action," thereby invoking First Amendment protections. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964) (in a "civil lawsuit between private parties," a court's application of "a state rule of law" can "impose invalid restrictions on . . . constitutional freedoms of speech and press"); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51

(1982) ("[A]pplication of state rules of law by . . . state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action'. . . ."); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by . . . application of a state rule of law in a civil lawsuit as by a statute."). Plaintiffs' claims are a misuse of the courts and serve no purpose other than to advance and amplify their publicity campaign against *Leaving Neverland*—a classic attempt to unlawfully chill and punish speech.[8]

Plaintiffs' attempt to breathe new life into an inapplicable non-disparagement sentence also violates HBO's due process rights and numerous California public policies. Indeed, Plaintiffs' claims represent a radical departure from California law, arguing that the contract lasts forever and broadly sweeps in any supposedly "disparaging" content about Mr. Jackson that may be exhibited by HBO until the end of time. *Cf. Kelly v. Johnson Pub. Co.*, 160 Cal. App. 2d 718, 723 (1958) ("Defamation of a deceased person does not give rise to a civil right of action[.]").

a. The First Amendment Protects *Leaving Neverland* and Bars Plaintiffs' Claims.

Plaintiffs' Petition was filed as a public shot across the bow, threatening to pursue and punish HBO in a "public" arbitration seeking over $100 million, even before *Leaving Neverland* debuted on HBO. Towards that end, Plaintiffs took a number of extraordinary steps: they filed their Petition in court (when they could have filed privately in arbitration), pled in detail the substance of their claims (when not required to compel arbitration), and claimed to be seeking that to which they are not entitled (punitive damages). Such speech-chilling conduct is antithetical to the First Amendment principles that protect speech on issues of public concern, and seeks to unlawfully punish "would-be critics" of public figures, who "may be deterred from voicing their criticism, even though it is believed to be true and even

[8] At prong two of an anti-SLAPP motion, courts consider affirmative defenses, including where they render contract provisions unenforceable. *See D'Arrigo Bros. of California v. United Farmworkers of America*, 224 Cal. App. 4th 790 (2014).

though it is in fact true. . . ." *Sullivan*, 376 U.S. at 725. Plaintiffs' claims strike directly "[a]t the heart of the First Amendment," which protects without fear of punishment "the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988) (noting that "[t]he freedom to speak one's mind is not only an aspect of individual liberty . . . but also is essential to the common quest for truth and the vitality of society as a whole"); *see also Sullivan*, 376 U.S. at 725 ("[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.").

That Plaintiffs' claims target not only protected speech but also a work of *creative expressive* speech containing newsworthy journalism is particularly noxious. The core First Amendment rights of filmmakers have been recognized and reaffirmed by the California Court of Appeal and the Ninth Circuit in the recent cases *De Havilland v. FX Networks, LLC* and *Sarver v. Chartier*, respectively—both of which applied the anti-SLAPP law to strike unlawful challenges to protected speech. The Ninth Circuit reiterated that film "is speech that is *fully protected by the First Amendment*, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." *Sarver*, 813 F.3d at 905 (emphasis added). The California Court of Appeal, expanding on *Sarver*, confirmed the critical First Amendment rights at issue:

> Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air—or, in these modern times, online. ***The First Amendment protects these expressive works and the free speech rights of their creators.***

De Havilland, 21 Cal. App. 5th at 849–50 (emphasis added). The court in *De Havilland* went on to observe:

> Whether a person portrayed in one of these expressive works is a world-renowned film star—'a living legend'—or a person no one knows, *she or he does not own history*. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.

Id. at 850 (emphasis added).

These bedrock principles compel the conclusion that the non-disparagement sentence in the 1992 Agreement cannot, consistent with the First Amendment, be interpreted as applying to *Leaving Neverland*. Indeed, the interpretation Plaintiffs urge the Court to ascribe to that sentence would put HBO at risk *in perpetuity* from doing "any act" that Mr. Jackson or his representatives might subjectively find disparaging, no matter the source of the information relied upon or how tenuous the connection between the challenged "act" and the 1992 Agreement.

Such restrictions are even more problematic given the ambiguous standard for disparagement. *See Vivian*, 214 Cal. App. 4th at 277 ("The term 'disparage' is itself somewhat ambiguous[.]"). Attempting to make actionable statements about a public figure contained in a protected expressive work based upon an ambiguous standard—without requiring "actual malice" as articulated in *Sullivan* and without requiring proof of falsity by clear and convincing evidence—runs afoul of the First Amendment and the prolific body of law confirming protection for the publication of truthful information. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) ("When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (confirming that public figures "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth"); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'") (quoting *Smith*

v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979)); *id.* at 533–34 ("Core purposes of the First Amendment" are implicated where a party attempts to "impose[] sanctions on the publication of truthful information of public concern."). Whether Plaintiffs maintain that the statements in *Leaving Neverland* are false or broadly disparaging, they cannot demonstrate actual malice by clear and convincing evidence, as required when attacking speech about a public figure on an issue of public concern.

Moreover, to expose HBO to the threat of damages for speech at a lower threshold than truthfulness and actual malice, Plaintiffs must prove that HBO waived, *by clear and convincing evidence*, its First Amendment rights to "disparage" Mr. Jackson for all time. *Leonard v. Clark*, 12 F.3d 885, 889–90 (9th Cir. 1993) (to be valid, a First Amendment waiver must be proved to be knowing, intelligent and voluntary "by clear and convincing evidence"); *see Sullivan*, 376 U.S. at 725 (noting danger of making actionable speech without finding of actual malice because "[a] rule compelling the critic of official conduct to guarantee the truth of his actual assertions . . . leads to . . . self-censorship"). Plaintiffs cannot do so, and their claims therefore fail for this reason alone.

Moreover, that Mr. Jackson is a high-profile public figure further underscores the serious First Amendment concerns that Plaintiffs' claims raise. *See Sullivan*, 376 U.S. at 270 (confirming the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustics, and sometimes unpleasantly sharp attacks" on public individuals). *Leaving Neverland* is a timely public exploration of compelling accusations of sexual abuse of minors by a famous and powerful individual, an issue of unquestionable public interest. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("'[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'") (quoting *Connick*, 461 U.S. at 145 (internal quotation marks omitted)).

Plaintiffs' claims also run afoul of the core First Amendment protections that

safeguard journalism. In addition to being an expressive work, *Leaving Neverland* is newsworthy reporting, which enjoys additional protection. *See Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 236 (1998) ("the United States Supreme Court has also observed that 'without some protection for seeking out the news, freedom of the press could be eviscerated'"); *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 519 (1986) ("the news gathering component of the freedom of the press—the right to seek out information—is privileged at least to the extent it involves 'routine . . . reporting techniques'").

Despite conceding that they cannot maintain a defamation claim on Mr. Jackson's behalf, Dkt. 1-1 ¶¶ 66–67, Plaintiffs seek to do precisely that:

> Other than ethics and journalistic norms, the main check on making a "powerful documentary" with false accusations . . . is the law of defamation. And *that* is the heart of the issue.

Id. ¶ 66. Although they disguise their claims as sounding in contract, the allegations in the Petition confirm that Plaintiffs' claims are in fact tort claims for defamation. Indeed, Plaintiffs purport to be seeking punitive damages against HBO (*id.* at 23 ("Petitioners further pray that the arbitrator award punitive damages in the maximum amount permissible")), which are not even available for contract claims. Cal. Civ. Code § 3294(a).[9] Threatening defendants with punitive damages, especially in the free speech context, is particularly dangerous. *Gertz*, 418 U.S. at 350 ("discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship"); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) ("Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are

[9] The Petition also characterizes HBO's conduct as an intentional tort. *See* Dkt. 1-1 ¶ 85 (alleging HBO is "*intending* to cause" damage to Mr. Jackson's legacy (emphasis added)).

administered. We have admonished that punitive damages pose an acute danger of arbitrary deprivation of property." (quotation omitted)).

Finally, while First Amendment rights can be waived by contract, a waiver will not be enforced "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by [its] enforcement." *Leonard*, 12 F.3d at 889–90 (quoting *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991)). Even if the non-disparagement sentence could constitute a valid waiver of HBO's First Amendment rights to speak on any issue (whether using confidential information or not) related to the 1992 Agreement, that sentence is unenforceable as it relates to *Leaving Neverland* because Plaintiffs' interpretation patently violates the First Amendment.[10]

b. Applying the Non-Disparagement Sentence to *Leaving Neverland* Would Violate HBO's Due Process Rights.

Plaintiffs' attempt to apply the non-disparagement sentence is an overbroad, unforeseeable application of that 27-year-old sentence that would violate HBO's due process rights under the Fifth Amendment to the U.S. Constitution. That is, the plain language of the non-disparagement sentence—buried within a rider that applies to confidential information learned by HBO during the performance of the 1992 Agreement, without any language confirming its survivability, and without any action over the past 26 years by Plaintiffs to confirm their belief in the survivability of rights under the 1992 Agreement—fails to provide HBO fair notice

[10] In prior briefing and at argument, Plaintiffs have cited to *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), for the proposition that "[n]ondisparagement and confidentiality clauses between private parties are generally enforceable under the First Amendment." Dkt. 25, p. 16. Plaintiffs' reliance on *Cohen* is misplaced. There, a political consultant (Cohen), who was promised anonymity by a newspaper, sued after the paper printed his name in connection with stories for which Cohen had provided anonymous sourcing. Unlike here, Cohen's claim was directly tied to the purpose of the underlying agreement. Here, the purpose of the underlying agreement was to set out the terms for the production and one-time exhibition of a concert in 1992, and bears no relation to the 2019 documentary.

of the claims that Plaintiffs now seek to assert against it. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (finding broadcaster's due process rights were violated and noting that "void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way"); *id.* at 253–54 ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."); *see also Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech.").

Reading perpetual life into the non-disparagement sentence nearly three decades after the 1992 Agreement was fully performed, and for the purpose of chilling unrelated speech by alleged successors-in-interest, is the type of overbroad and arbitrary suppression of speech that would violate HBO's due process rights. That violation is particularly acute here, where Petitioners are trying to bring a legally and constitutionally barred defamation claim disguised as a contract claim.

c. The Non-Disparagement Sentence Is Also Unenforceable on Public Policy Grounds.

Other important public policies also militate against allowing Plaintiffs to pursue their claims against HBO for exhibiting *Leaving Neverland*. *See* Cal. Civ. Code § 1667 ("private contracts that violate public policy are unenforceable"); *Leonard*, 12 F.3d at 889–90 (First Amendment waivers will not be enforced "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement" of the waiver); *Fisher v. DCH Temecula Imports LLC*, 187 Cal. App. 4th 601, 617 (2010).

For instance, enforcement of the non-disparagement sentence would run afoul of the constitutional and statutory limitations against defamation claims brought on behalf of deceased individuals. *See, e.g.*, *Kelly*, 160 Cal. App. 2d at

723. The United States and California Supreme courts have repeatedly refused to allow plaintiffs to perform an end-run around bars on defamation claims by assigning a different label to their claim. *See, e.g.*, *Reader's Digest Ass'n, Inc. v. Superior Court*, 37 Cal. 3d 244, 265 (1984) (noting that *Sullivan* "defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability" that does "not depend on the label given the stated cause of action"); *see also Hustler Magazine*, 485 U.S. at 56 (extending actual malice standard from defamation to intentional infliction of emotional distress and holding that public figures "may not recover for [IIED] . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'"); *Kashani v. Tsann Kuen China Enterprise Co.*, 118 Cal. App. 4th 531, 543 (2004) ("[A] violation of federal law is a violation of law for purposes of determining whether or not a contract is unenforceable as contrary to the public policy of California.").

Applying the non-disparagement sentence to HBO's exhibition of a documentary film regarding a deceased individual would be unprecedented for another reason: it would legitimize the creation of a special category of wealthy, powerful, or famous individuals who could—through a lifetime of contracts with or influence over news or media companies—preserve via contract posthumous control over how they are portrayed in a way that ordinary citizens cannot. Such a result would run counter to California's public policy barring claims for defamation of deceased individuals. *See Kelly*, 160 Cal. App. 2d at 723.

2. Plaintiffs Cannot Establish a Reasonable Probability of Prevailing on Their Breach of Contract Claims because the 1992 Agreement Does Not Pertain to *Leaving Neverland* and Is Expired.

Plaintiffs' claims fail for another reason: the non-disparagement sentence on which they are based is inapplicable and expired. To prevail on their contract claims, Plaintiffs must prove "the existence of a valid contract, [Plaintiffs'] performance of the contract or excuse for nonperformance, [HBO]'s breach, and

resulting damage." *Bakst v. Comm. Mem. Health Sys., Inc.*, 2011 WL 13214315, at *7 (C.D. Cal. Mar. 7, 2011) (describing elements of claim for breach of contractual non-disparagement provision). But Plaintiffs cannot demonstrate that there is a reasonable probability they will prevail on their claims because they cannot establish the existence of a contract that applies to this dispute, much less a valid contract. First, the 1992 Agreement is inapplicable to this dispute, which neither pertains to *Live in Bucharest* nor implicates confidential information that HBO learned in the performance of the Agreement. Second, because the 1992 Agreement terminated decades ago with no survivability provision, there is no existing valid agreement on which Plaintiffs may sue.

a. The 1992 Agreement Does Not Pertain to *Leaving Neverland*.

Plaintiffs' claims fail for the simple reason that the 1992 Agreement does not reach *Leaving Neverland*. The Confidentiality Provisions that contain the non-disparagement sentence specifically state that the confidentiality guidelines apply to information "acquired by HBO *in the course of HBO's contact with Licensor and Performer*," but specifically do *not* address any later-acquired information. Dkt. 18, Ex. B (Ex. I, at 1) (emphasis added). But Plaintiffs have not and cannot prove that HBO obtained any information from TTC or Mr. Jackson during performance of the 1992 Agreement that was included in *Leaving Neverland*. To the contrary, the documentary was developed by a third party, Amos Pictures, based on the stories of two men who independently and willingly provided information to the filmmakers. *See* Dkt. 22-1 ¶ 3. Amos Pictures then licensed the documentary to HBO for distribution in the United States, Canada, and Bermuda. *See id.*

Leaving Neverland thus falls categorically outside the scope of the Confidentiality Provisions because Plaintiffs have not provided any evidence that HBO obtained confidential information or trade secrets during the 1992 filming of *Live In Bucharest*; that HBO provided confidential information to the filmmakers who independently shot, filmed, and created *Leaving Neverland*; or that the

filmmakers then incorporated such information into *Leaving Neverland*. *See* Cal. Civ. Code § 1648 ("However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."); *id.* § 1650 ("Particular clauses of a contract are subordinate to its general intent.").

Moreover, *Leaving Neverland* and *Live in Bucharest* are entirely separate films, and bear no relation to one another. *Leaving Neverland* does not mention or discuss *Live in Bucharest*, the Bucharest concert itself, or HBO's exhibition of the *Live in Bucharest* concert special; it contains no concert footage or other content from *Live in Bucharest*; and it neither mentions nor discusses the 1992 Agreement. *See* Dkt. 30, at 4–5. There is simply no connection between the 1992 Agreement and *Leaving Neverland*.

b. No Valid Contract Exists because the 1992 Agreement and Its Non-Disparagement Sentence Have Expired.

Once a contract has expired, "[i]t logically follows" that there can be no breach of that contract because there is "no contract in existence to breach." *East Bay Union of Machinists v. Fibreboard Paper Prods. Corp.*, 285 F. Supp. 282, 288 (N.D. Cal. 1968), *aff'd*, 435 F.2d 556 (9th Cir. 1970). Under California law, a contract that has been fully performed by both parties, as the 1992 Agreement has been here, is terminated and expired. Cal. Civ. Code § 1473 ("Full performance of an obligation, by the party whose duty it is to perform it . . . extinguishes it."); *Giles v. Horn*, 100 Cal. App. 4th 206, 228 (2002) (plaintiffs' contract claim dismissed as moot where "contracts [had] been fully performed and [had] expired"); *Hidden Harbor v. Am. Fed'n of Musicians*, 134 Cal. App. 2d 399, 402 (1955) (contract deemed expired when "fully performed by both parties" and has "no vitality after its termination").

The 1992 Agreement granted TWE a license to exhibit the program on HBO "one time only" on October 10, 1992, "and at no other time." Dkt. 18, Ex. B at 2. In consideration for these rights, TWE paid TTC a license fee, the last portion of which was to be delivered within five days after the delivery of the program to

TWE (with delivery no later than October 8, 1992). *Id.* at 1–2. The longest any performable rights or obligations lasted under the 1992 Agreement was through the "Holdback Period"—defined as the 12-month period immediately following the October 10, 1992 exhibition date. *Id*. at 2, 5–6. The parties to the 1992 Agreement fully performed their obligations a quarter-century ago, after the conclusion of the Holdback Period ended, on or about October 10, 1993 (one year after exhibition of the concert special). *See* Dkt. 22-1 ¶ 2. HBO has not exhibited the special since October 10, 1992, and it is not currently available on any HBO platform, nor has it been available since the original, one-time exhibition more than 25 years ago. *See id.* ¶ 5. The obligations under the 1992 Agreement have thus long been fulfilled, and the Agreement has terminated.

Plaintiffs cannot establish that the non-disparagement sentence survived performance of the Agreement. Courts as a matter of sound policy do not interpret contracts as conferring perpetual rights unless clearly and specifically provided. *Cooper Cos. v. Transcon. Ins. Co.*, 31 Cal. App. 4th 1094, 1103 (1995) ("[C]onstruing a contract to confer a right in perpetuity is clearly disfavored."); *Nissen v. Stovall-Wilcoxson Co.*, 120 Cal. App. 2d 316, 319 (1953) ("A [contractual] construction conferring a right in perpetuity will be avoided *unless compelled by the unequivocal language of the contract*." (emphasis added)) (quoting 17 C.J.S. Contracts § 398); *id.* ("A contract will be construed to impose an obligation in perpetuity *only* when the language of the agreement compels that construction." (emphasis added) (internal quotations and second citation omitted)). In recognition of this policy, courts hold that rights that arise under non-disparagement and confidentiality clauses survive contract termination only where the contract specifically provides for that result. *See Allan Block Corp. v. Cty. Materials Corp.*, 634 F. Supp. 2d 979, 1000 (D. Minn. 2008) (dismissing plaintiff's claim that defendant breached non-disparagement provisions "months after the termination" of the contracts because although "a contractual provision may survive

the underlying contract's expiration," there was "no language" in the contracts "indicat[ing] that the non-disparagement provisions survive termination"); *see also Am. Family Mut. Ins. Co. v. Roth*, 485 F.3d 930, 933 (7th Cir. 2007) (contract forbidding disclosure of confidential information that is not a trade secret is "enforceable . . . only if the contractual prohibition is reasonable in time and scope and, specifically, *only if its duration is limited*" (emphasis added)).

The 1992 Agreement says nothing about survival of the non-disparagement sentence. The parties could have so provided, of course, if that was their intention. But there is simply no language in the Agreement stating that HBO agreed to be bound *for all time* from publishing anything that might be considered to be disparaging of Mr. Jackson. Indeed, HBO has not found a single case (in California or elsewhere) where a non-disparagement clause was enforced posthumously, let alone in perpetuity. If the parties intended such an unusual agreement to perpetually waive HBO's First Amendment rights, it had to be explicit.[11]

Plaintiffs' (and their alleged predecessors') conduct is also inconsistent with their apparent newfound belief that the 1992 Agreement is still viable. Specifically, HBO does not have in its records any notices from TTC or Mr. Jackson's representatives informing HBO that Optimum Productions was stepping into TTC's shoes regarding any alleged ongoing rights and obligations of the 1992 Agreement,

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[11] Plaintiffs' interpretation also belies common sense. It would mean that in exchange for the right to exhibit one concert, one time, in addition to paying a license fee, HBO agreed to restrict *in perpetuity* everyone involved in any future programming to be exhibited by HBO—be it a stand-up comic, late-night talk show host, or documentary filmmaker—from commenting on a controversial public figure. *See* Cal. Civ. Code §§ 1648 ("However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."); 1643 ("contract must receive such an interpretation as will make it *lawful*, operative, *definite*, *reasonable*, and capable of being carried into effect" (emphases added)); 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, *and does not involve an absurdity*." (emphasis added)).

nor any notices providing updated contact information for those parties pursuant to the Notice provision of the Agreement. *See* Dkt. 22-1 ¶ 7. The Notice section of the Agreement provides that notice to TTC should be sent to Greenberg, Glusker, Fields, Claman & Machtinger with copies to MJJ Productions, Inc. ("MJJ"), via the business management firm Breslauer, Jacobson, Rutman & Sherman. *See* Dkt. 18, Ex. B at 8. But neither TTC nor MJJ is a party to this action, and neither Greenberg Glusker nor Breslauer Jacobson apparently represents any of the Plaintiffs. Indeed, Breslauer Jacobson no longer exists, having ceased using that same name in 1993, and being fully dissolved in 2007. *See* Dkt. 22-2 ¶¶ 3–5, Exs. B, C, D.[12] Plaintiffs' failure to act consistent with a belief that there was a valid agreement is further confirmation that, prior to their efforts to attack *Leaving Neverland*, no one thought the 1992 Agreement had any continuing validity.

But, the best evidence regarding the Parties' belief regarding the expiration (and inapplicability, *see supra*, Section IV.B.2.a.) of the contract is Plaintiffs' own conduct in seeking to dissuade HBO from exhibiting *Leaving Neverland*. Before Plaintiffs filed their Petition on February 21, 2019, their counsel sent HBO's former CEO a letter, on February 7, 2019, strenuously demanding that HBO not show the documentary. Dkt. 18, Ex. A. However, nowhere in that detailed ten-page letter did Plaintiffs' counsel ever mention the non-disparagement sentence or mention any legal claims that Plaintiffs believed they had against HBO. The reason is obvious—Plaintiffs did not believe they had any viable claim against HBO, whether in tort or based on a 26-year-old, fully performed contract. This, despite the fact that Plaintiffs knew that HBO and Jackson had previously partnered on *Live in Bucharest*. *See id.* at 9 (acknowledging that HBO "had partnered with Michael to immense success"). Instead, through pointed language that variously impugned

[12] *See also* James Bates, *Defections, Merger Shake Up Closed World: Hollywood: Breakup of Breslauer, Jacobson, Rutman & Chapman Changes the Status Quo of Managers' World*, Los Angeles Times, Apr. 1, 1994, https://www.latimes.com/archives/la-xpm-1994-04-01-fi-41138-story.html.

HBO, its leadership, its ownership, Mr. Robson, Mr. Safechuck, and the film's director Dan Reed, Plaintiffs' counsel pressured HBO to pull the film. When HBO did not capitulate, Plaintiffs very publicly filed their Petition in court, claiming they will seek a speculative but headline-grabbing amount of $100 million in actual and punitive damages, even though at that point the documentary would not debut on HBO for another two weeks. That Plaintiffs apparently found the non-disparagement sentence buried in the 1992 Agreement in the two weeks after sending their February 7 letter does not change the fact that the Agreement had long since expired.[13]

V. CONCLUSION

Plaintiffs' claims fail because they violate the First Amendment, Due Process Clause and public policy, and in any event, the contract on which they are based is inapplicable and expired. California's Anti-SLAPP law empowers—indeed requires—this Court to put an end to this litigation now.[14] Accordingly, the Court should strike Plaintiffs' Petition and claims with prejudice, and award attorneys' fees and costs to HBO pursuant to the anti-SLAPP law's mandatory attorneys' fees clause for prevailing defendants.[15]

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[13] Other contract interpretation maxims confirm the expiration of the non-disparagement sentence. For example, the confidentiality rider that Plaintiffs seek to enforce was drafted by TTC (or Mr. Jackson's representatives), not HBO, and therefore any ambiguity regarding the survivability of the non-disparagement sentence should be read against Plaintiffs. *See* Dkt. 22-1 ¶ 6; Cal. Civ. Code § 1654 ("In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.").

[14] Because Plaintiffs' claims must be stricken pursuant to HBO's Special Motion to Strike, the Court need not rule on Plaintiffs' pending Motion to Compel, as once the Petition is stricken, there is nothing on which to compel an arbitration.

[15] Cal. Code. Civ. Proc. § 425.16(c)(1) ("a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs"); *U.S. ex rel. Newsham v. Lockheed Missiles Space Co. Inc.*, 190 F.3d 963, 972–973 (9th Cir. 1999) (finding mandatory fees provision of California's anti-SLAPP law applicable in federal court).

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